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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 349

JAMES L. FORESTER, JR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI

JAMES L. FORESTER, JR.
3110 Mt. Vernon Ave.
Alexandria, Va.
Petitioner pro se

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PETITION FOR WRIT OF CERTIORARI

Judgment sought to be reviewed:

Dismissal of Appeal taken to Fourth Circuit Court of Appeals.

Date of Filing of Judgment: April 6, 1966.

Statutory Provision believed to confer on Supreme Court of the United States jurisdiction to review this judgment by writ of certiorari: 28 U.S. Code § 1254.

Question presented for review:

Whether or not Forester has a cause of action against the United States.

STATUTES INVOLVED

Title 28, United States Code § 1346(b):

> (b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

§ 2674. Liability of United States.

> The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

Conn. Gen. Statutes (Revision of 1902)
§ 1296 (repealed) *Intimidation; boycotting.*

> Every person who shall threaten, or use any means to intimidate any person to compel such person, against his will, to do or abstain from doing any act which such person has a legal right to do, or shall persistently follow such person in a disorderly manner, or injure, or threaten to injure, his property, with intent to intimidate him, shall be fined not more than one hundred dollars, or imprisoned not more than six months.

Conn. Gen. Statutes (Revision of 1958)
§ 53-174. *Breach of the Peace. Intimidation. Libel.*

Any person who disturbs or breaks the peace by tumultuous and offensive carriage, noise or behavior, or by threatening, traducing, quarreling with, challenging, assaulting or striking another, or disturbs or breaks the peace, or provokes contention, by following or mocking any person, with abusive or indecent language, gestures or noise, or, with intent to frighten any person, threatens to commit any crime against him or his property or writes or prints and publicly exhibits or distributes, or publicly exhibits, posts up or advertises, any offensive, indecent or abusive matter concerning any person, shall be fined not more than five hundred dollars or imprisoned not more than one year or both. (1949 Rev., § 8518)

STATEMENT OF CASE

Civil Action No. 320 was brought by Forester against the United States of America under the Federal Tort Claims Act, Title 28, U.S. Code 1346(b).

The charge has been made by Forester that Edward W. O'Meara and Leo E. Francini, employees of the Veterans Administration, did intentionally and without just cause drive James L. Forester, Jr. out of the homebuilding business in the New London-Groton, Connecticut, market area. This action caused the following damage to Forester:

1. A loss of certain homes warranted by Forester.
2. A loss of certain loans and bonds guaranteed by Forester totaling $312,000.
3. A loss of investment, profit, salary, bonus, and expenses totaling $155,639.

The United States District Court for the Eastern District of Virginia dismissed on the following grounds: 1) that this is a corporate suit brought in an individual name, and 2) that the Government has not consented to be sued for this wrong. The District Court has interpreted this wrong as deceit and misrepresentation.

Forester did not agree: 1) that this is a corporate suit, nor did he agree 2) that either deceit or misrepresentation existed. Therefore, an appeal was taken to the Fourth Circuit Court of Appeals.

The Fourth Circuit Court of Appeals dismissed on the grounds that it appeared to them that Forester had misconceived his remedy, that Forester had failed to state a cause of action against the United States, and that the appeal appeared to be without merit.

ARGUMENT

It appears that because of the general wording of the order of dismissal from the Eastern District Court of Virginia and the general wording of the order of dismissal from the Fourth Circuit Court of Appeals that this Petition must deal with the basis of the complaint, and show a cause of action.

The gist of this case is that under Connecticut law: 1) It is not lawful for one person to destroy another person's business without a just cause; and 2) If one injures the property of another he is liable in a civil action for damages.

From *Goldman v. Feinberg*, 37 A.2d 355, 130 Conn. 671:

> We, in this state, recognize that a cause of action does exist for unlawful interference with business and that it is not essential to that cause of action that it appear that the tort has resulted in a breach of contract to the detriment of the

plaintiff. *Wyneman v. Deady*, 79 Conn. 414, 65 Atl. 129; *Skene v. Carayanis*, 103 Conn. 708, 131 Atl. 497. As we said in the *Skene* case (p. 714), "The law does not, however, restrict its protection to rights resting upon completed contracts, but it also forbids unjustifiable interferences with any man's right to pursue his lawful business or occupation and to secure to himself the earnings of his industry. Full, fair and free competition is necessary to the economic life of a community, but under its guise, no man can by unlawful means prevent another from obtaining the fruits of his labor."

From *Soucy v. Wysocki*, 139 Conn. 622:

> No citation of authority is required to demonstrate that ordinarily, at common law, if one injures the property of another wilfully, wantonly or negligently, he is liable in an action for damages.

Also, from *Soucy v. Wysocki*, a wilful act is one that is "intentional, wrongful and without just cause of excuse." *Rogers v. Doody*, 119 Conn. 532, 534, 178 A. 51; *Sharkey v. Skilton*, 83 Conn. 503, 506, 77 A. 950.

From *State v. Stockford*, 77 Conn. 227:

> A combination to cause a strike for the purpose of injuring and destroying the business and property of another, or of depriving another of his liberty or property without just cause, is both unlawful and criminal. 1 Eddy on Combinations, ¶ 521 et seq.; *Old Dominion S.S. Co. v. McKenna*, 30 Fed. Rep. 48; *Arthur v. Oakes*, 63 id. 310, *Plant v. Woods*, 176 Mass. 492, 498; *State v. Stewart*, 59 Vt. 273, 289; *State ex rel. Durnet v. Huegin*, 110 Wis. 189; *Doremus v. Hennessy*, 176 Ill. 608; *State v. Glidden*, 55 Conn. 46, 71.

Also from *State v. Stockford*, 77 Conn. 227:

> The language or conduct which will constitute the unlawful use of threats or means to intimidate, need not be such as to induce a fear of personal injury. Any words or acts which are calculated and intended to cause an ordinary person to fear an injury to his person, business or property, are equivalent to threats. *State v. Donaldson*, 32 N.J.L. 151; *Barr v. Essex Trades Council*, 53 N.J.Eq. 101; *Crump v. Commonwealth*, 84 Va. 927; *Rogers v. Evarts*, 17 N.Y. Supp. 264; *O'Neil v. Behanna*, 182 Pa. St. 236.

This is a case that comes under a law (The Tort Claims Act) where it appears that there have been relatively few cases and neither the District Court nor the Circuit Court of Appeals knows what the law means. The District Court referred to "*Newstadt v. USA*, 366 US 696." This is a case in which this same District Court (Eastern District of Virginia) had decided a tort claims case, was upheld by the Fourth Circuit Court of Appeals, and was reversed by the Supreme Court. The *Newstadt* case is a case in which the United States Supreme Court held that negligent misrepresentation was excepted by § 2680(h) of Title 28. Wilful destruction of Forester's business is charged here.

I can only conclude, considering the facts that follow that 1) the District judge wanted to get the case out of his court as fast as possible and to get a higher court's opinion before proceeding further, and that 2) because of the general wording of the order from the District Court, the Circuit Court of Appeals could see no other satisfactory decision than the one that they issued.

1. This case has never gotten past the pre-trial stages. No depositions were taken.

2. I believe the *Newstadt* decision has been misapplied. I further believe that the District judge did not have enough evidence to really be able to decide whether *Newstadt* applied or not.

3. The District judge brought up the *Newstadt* decision as applying, not the U. S. attorney, at the hearing on February 12, 1965 when he dismissed.

4. The District Court judge dismissed this case on a hearing on motions on February 12, 1965. On October 10, 1964 (the hearing prior to the February 12, 1965 hearing) the District judge refused to entertain the U. S. Attorney's motion to dismiss on the grounds that this was a corporate action without first getting from the U. S. Attorney the evidentiary evidence which the U. S. Attorney could use in a motion to dismiss. Yet the District judge did dismiss on February 12, 1965 for this reason (and *Newstadt*) without this evidentiary evidence from the U. S. Attorney. He dismissed without permitting Forester to argue his motion (Amended Motion for Production of Documents).

In short, I believe that the District Court and Circuit Court of Appeals have decided (without sufficient evidence) an important question of Federal law that has not been but should be settled by the Supreme Court and, further, that the District Court has misapplied a former opinion of the Supreme Court, the *Newstadt* opinion.

Petitioner therefore respectfully prays that a writ of certiorari be granted.

JAMES L. FORESTER, JR.
3110 Mt. Vernon Ave.
Alexandria, Va.

Petitioner pro se

CERTIFICATE OF SERVICE

I, James L. Forester, Jr., hereby certify that service of the foregoing Petition for Writ of Certiorari was made upon respondents by delivery of five copies thereof on the 1st day of July, 1966, at the office of the attorneys of record as follows:

Thurgood Marshall, Solicitor General
Department of Justice
Washington 25, D. C.

John D. Schmidtlein
Asst. U. S. Attorney
Eastern District of Virginia
Alexandria Division
Post Office Building
Alexandria, Va.

JAMES L. FORESTER, JR.

APPENDIX

[Filed April 6, 1966]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10,262

JAMES L. FORESTER, JR.,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Alexandria.
Oren R. Lewis, District Judge.

ORDER

It appearing from (1) the original and amended complaints and (2) the factual assertions made by the plaintiff upon presentation of his motion to amend or reconsider the District Court's judgment of dismissal that plaintiff, acting pro se, has misconceived his remedy, if any he has, for alleged wrongful acts and has failed to state a cause of action against the defendant; and, furthermore, it appearing that this appeal is without merit, it is

ORDERED, that this appeal be and the same is hereby dismissed.

HERBERT S. BOREMAN
United States Circuit Judge

ALBERT V. BRYAN
United States Circuit Judge

Dated:

A. D. BARKSDALE
United States Circuit Judge

_____, 1966

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner, acting in his own right, sued the United States under the Federal Tort Claims Act, 28 U.S.C. 1346(b), alleging that employees of the Veterans Administration had wilfully under-appraised the value of homes that had been built by a corporation of which petitioner was a director and officer; and that this caused the corporation's eventual bankruptcy and resulted in petitioner's loss of his salary, loss of his corporate investment in and possible profits from the

building corporation's parent corporation, and his liability for certain of the building corporation's obligations which he underwrote (C.A. App. 1-2, 18-19).[1] The district court dismissed on the grounds (1) that any right which arose from these events belonged to the corporation and could not be pursued by petitioner without either joining the corporation or suing as a member of the class of stockholders,[2] and (2) that in any case the United States was not liable for the occurrences in light of 28 U.S.C. 2680(h)[3] (C.A. App. 11, 24). The court of appeals dismissed petitioner's appeal, holding that he had misconceived his remedy for any right that he might have, and that his appeal was without merit (Pet. App. 1).

The questions involved were decided correctly by the courts below. Any claim which could have been asserted against the United States under the Tort Claims Act because of the allegedly deliberate underappraisal of the homes built by the corporation clearly belonged to the corporation and not to petitioner in

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[1] "C.A. App." references are to the pages of the appendix of petitioner's brief and appendix in the court of appeals, which is a part of the record in this Court.

[2] See Rule 23, F.R. Civ. Proc. The court had dismissed petitioner's previous complaint for his failure to join the corporation or to show compliance with Rule 23, but had given him leave to amend (C.A. App. 3-4).

[3] That section provides in pertinent part as follows:

> The provisions of * * * section 1346(b) * * * shall not apply to—
>
> * * * *
>
> (h) Any claim arising out of * * * misrepresentation, deceit, or interference with contract rights.

his individual capacity. His failure to join the corporation or to proceed under Rule 23 after being given an opportunity to do so was itself a sufficient basis for dismissal of the suit, see Rule 17(a), F.R. Civ. Proc. In addition, the underlying claim is plainly barred by 28 U.S.C. 2680(h), excluding claims arising out of misrepresentation. *United States* v. *Neustadt*, 366 U.S. 696. If the individuals named in the complaint did, in some unauthorized manner, conspire against petitioner personally, then, as the court of appeals held, petitioner misconceived his remedy in suing the United States.

The disposition below is plainly correct and the petition should be denied.

Respectfully submitted.

THURGOOD MARSHALL,
Solicitor General.

AUGUST 1966

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Respondents.

REPLY BRIEF FOR PETITIONER FOR WRIT OF CERTIORARI

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Petitioner pro se

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REPLY BRIEF FOR PETITIONER FOR WRIT OF CERTIORARI

This reply brief is necessary to 1.) add footnotes to apply to the petition for writ of certiorari, 2.) show my understanding of the dismissal of the original complaint on December 27, 1963. My understanding is different from the explanation in the memorandum for the United States in opposition, 3.) make a statement on misrepresentation, and 4.) make a statement on interference with contract rights.

I.

Footnotes to apply to petition for writ of certiorari.

	Petition for writ of Certiorari		References
	page	paragraph	
1.	4	1	**C. A. App. 11, 14, 15 Appendix
2.	4	3	C. A. App. 12
3.	6	2	C. A. App. 11
4.	7	numbered 3	***see reporter's transcript of proceedings on 10/2/64 pages 7, 8
5.	7	numbered 4*	

II.

1. Page 2, footnote 2 of the United States memorandum states the following " . . . The court dismissed petitioner's previous complaint for his failure to join the corporation or to show compliance with Rule 23, but had given him leave to amend (C.A. App. 3-4)."

* 10/10/64 should read 10/2/64

** "C.A. App." references are to the pages of the appendix of petitioner's brief and appendix in the court of appeals, which is part of the record in this court.

*** Part of the record in this court.

2. Following is my understanding of why the court dismissed the original complaint on December 27, 1963. The District Judge told me that he read the original complaint to mean that I was bringing the suit for the corporation. I told him that this was not my intention. The Judge gave me leave to amend. The amended complaint was a rewording in an attempt to make it clear that Forester was bringing the suit for Forester.

III.

The elements of misrepresentation and/or deceit are just not in evidence. In particular the element of of reliance is missing. *Prosser on Torts*, 3d.¶103, p. 729.

IV.

The U. S. Attorney brought up in his brief to the Circuit Court of Appeals the possibility of this suit being exempted from the Tort Claims Act if treated as interference with existing contracts or the loss of prospective advantage (C.A. Appellee's brief p. 10). There may be some merit in this Argument (when developed) to knock out part of the claim. However, this was only brought up this once. It has not been argued.

Respectfully submitted,

JAMES L. FORESTER, JR.
3110 Mt. Vernon Ave.
Alexandria, Va.
Petitioner pro se

CERTIFICATE OF SERVICE

I, James L. Forester, Jr., hereby certify that service of the foregoing reply brief was made upon respondents by delivery of five copies thereof on the 9th day of September, 1966, at the office of the attorneys of record as follows:

Thurgood Marshall, Solicitor General
Department of Justice
Washington 25, D. C.

John D. Schmidtlein
Asst. U. S. Attorney
Eastern District of Virginia
Alexandria Division
Post Office Building
Alexandria, Va.

JAMES L. FORESTER, JR.

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PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING ON PETITION FOR WRIT OF CERTIORARI

This petition is being filed on the following two substantial grounds available to petitioner although not previously presented.

1. The charge is hereby made that contact was made between the District Judge and/or his office and the U.S. Attorney and/or his office prior to the hearing on motions on February 2, 1965, the District Judge being persuaded to the U.S. Attorney's view to dismiss the case before the hearing commenced.

2. The Federal Courts in this case are fostering tyranny in the Federal Government, and are unnecessarily contributing to the coming of a world where ",..... no man might buy or sell, save he that had the mark, or the name of the beast, or the number of his name." The Federal Courts should at least deliver an opinion in this case and issue an order that is not general. The only thing that the Court orders in this case mean is that the case has been dismissed.

a.) I charged that my personal business was deliberately destroyed without a just cause by certain U. S. officials. On March 22, 1961, Leo E. Francini, one of these officials, told me "that he could do anything he wanted and that there was nothing that anyone could do about it". He had been proved right.

This case has been badly handled by the Federal Courts and should be returned to the District Court to be properly handled.

Respectfully submitted,

James L. Forester, Jr.

October 1966

CERTIFICATION

I hereby certify that this petition is presented in good faith and not for delay, and that this petition is restricted to substantial grounds available to petitioner although not previously presented.

James L. Forester, Jr.

CERTIFICATE OF SERVICE

I, James L. Forester, Jr., hereby certify that service of the foregoing Petition for Rehearing on Petition for Writ of Certiorari was made upon respondent by delivery of five copies thereof on the 28th day of October 1966, at the office of the attorneys of record as follows:

Thurgood Marshall, Solicitor General

Department of Justice
Washington, D. C.

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Alexandria, Virginia

James L. Forester, Jr.